SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 837

MONIQUE VonCLEEF and
JAMES ALBERT BEARD,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

STATE'S BRIEF IN OPPOSITION

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Counter-Questions Presented

1. Whether the search incidental to an arrest was reasonable?

a) Whether there was probable cause for the arrest?

b) Whether the scope of the search was unreasonable?

2. Whether the State may make criminal a commercial enterprise in which defendants disciplined and punished people with a sado-masochistic sexual aberration for profit? Whether that question may be raised in this Court when the issue was never raised in the Appellate Division?

3. Whether any of the books and material seized is obscene under any definition of obscenity permitted by the First Amendment to the United States Constitution?

4. Does the Due Process Clause of the Fourteenth Amendment require that evidence of other publications held not obscene by this Court be admitted into evidence?

Counter-Statement of Facts

About the middle of October, 1963, Detective Arthur Magnusson, Obscenity Investigations Specialist of the Essex County Sheriff's Office, received from a citizen a copy of a publication known as *Flair*. He gave it to John Kallies, Postal Obscenity Specialist for the New Jersey area and with whom Magnusson collaborated in investigating obscenity matters involving the United States mail

Since Flair Publications was indicated as located in New York City, Kallies sent the copy of *Flair* there. Kallies reported to Magnusson that *Flair* had a post office box in New York City, signed for by a James Beard. Sometime before receiving this copy of *Flair,* Magnusson had obtained a copy of another similar publication known as *La Plume,* which he described as "one of the forerunners of the sex-type clubs . . . probably one of the most active in the country". Magnusson had learned through New York postal Inspector Dolan that a photograph of Monique Von Cleef appeared in this particular edition with a code number of 174 and the following caption:

> "N.Y.C.—Exotic Miss, 30 yrs. 36-26-36. Extremely interested in rubberwear, satin, french lingerie, discipline, etc.; Anxious to experiment. Will correspond with all. Write descriptively. Photo appreciated." (Pa. 4).

Detective Magnusson testified that the investigation in this case began when Postal Inspector Kallies handed him a letter, which was intercepted by the postal authorities and was addressed to one Ted Sullivan. The letter said in part "My new telephone number is 201-484-0840. The charge for consultation is $50.00 and it is signed Superior Monique" (T. 2.64). Detective Magnusson determined from the telephone company that the telephone

was listed to one Marianna Von Cleef, 850 Lake Street, Newark, N. J. (T. 2.65). Magnusson then spoke to Miss Von Cleef while pretending to be Ted Sullivan. That conversation is set out in the trial transcript (T. 2.65 to 66; 68 to 70). The pertinent portion of that telephone conversation follows:

> Magnusson: Could you tell me what you do for the fee, you know?
>
> Von Cleef: Just an hour and a half of discipline.
>
> Magnusson: Yeh. Do you think I could get it without clothes on, just the high heels?
>
> Von Cleef: Oh, we will talk about it later.
>
> Magnusson: Heh?
>
> Von Cleef: I would want to talk to you first. (PB. 2).

The detective and other police officers arrived outside the Lake Street premises at about 1:00 o'clock. Magnusson went in alone (T. 2.71). The door was opened for him by the defendant Beard, and when the detective asked to see Monique the defendant Beard said, "come on up stairs" Miss Von Cleef entered and they went to the third floor (T. 2.72).

She told him to take off his coat and make himself comfortable. She offered him a drink and gave him a copy of *Spankers Monthly* and told him to read it (T. 2.57). When Magnusson questioned Von Cleef about the people working dowstairs she replied, "don't worry, there is nothing to worry about. You are safe as if you were in the bank of England." She told him that the people working were a plumber and an electrician and a carpenter because she was having the house redecorated. Before she left the room to get the drink, Von Cleef said, "You can read the publication it will excite you" (T. 2.76). Miss Von Cleef returned and had a 10 oz. glass with about 5 or 6 ounces of scotch in it and somewater.

She then asked the detective to tell her something about himself. He said that he needed to be discreet, but she said she needed to know something about him to help him (Tr. 2.77). After further conversation which included a discussion of flagellation, sadism and transvestism, she asked the detective about his history in flagellation. He demurred remarking that he could not say too much because he had to be discreet. The following then took place. Magnusson said,

> "Well, I explained that I hadn't had too much experience at being the servant of a professional sadist and she asked me, she said, Well, when did you first start liking to be whipped? I said—let's see—I said that I had had an experience with a girl whom I knew and I went out with and we engaged in flagellation, and she would whip me to a point where I would be sexually aroused, and then we would consummate the normal sex act, and Miss Von Cleef at this point said, Well, I won't have intercourse with you. I said, No. I realize that you're just going to whip me until I have an orgasm, and Miss Von Cleef said 'Yes'. When she asked me about it, when did it first start, I also stated that you can't find too many people who know about this or who really understand it, and she acknowledged that, 'Yes, I understand that', and she made a reference that in Europe this practice is quite common and that she thoroughly understood it." (PA. 6-7).

The discussion continued and the Detective Magnusson said that he entered some ads from the magazine La Plume but that he had only met fakes. Miss Van Cleef replied, "After this I can put you in contact with people that are not fake" (T. 2.79). Miss Van Cleef said that she was very knowledgeable in this area and had clients all over

the country. She also told the detective that she flew to a lot of people to take care of his business (T. 2.80). He responded "You must really know your business." and she replied "that she was quite experienced at this" (PA. 6). At that time she asked him if he would like to try some bondage. He declined. At the close of the conversation she told the detective "now take all your clothes off and put these on (referring to a pair of women's high heel shoes). When I come back I want to see you on that bed in a kneeling position. All your clothes off. I'm the boss" (T. 2.80 to 81).

The detective removed his tie, shirt, undershirt and shoes and socks. While the defendant was out of the room he opened a door into another room in which he observed a black object on legs with a hole in it, later identified as a torture box. As he looked out in the hall, he said he also saw Miss Von Cleef in the process of donning her costume. When she came back into the room she asked why he was not undressed, and upbraided him for taking too long. She was attired, he said, in black high-heeled shoes, net stockings and a "tight-fitting rubber apparatus which would resemble a bathing suit". Saying that he was a little nervous, he proceeded to the lavatory. On the way he observed a strap about 16 inches long on the bed (PA. 7). The rest of the police officers entered the house at this point according to the pre-arranged plan. Magnusson then arrested Von Cleef (T. 2.85).

Detective Magnusson also explained to the court just how an operation like *Flair* and *LaPlume* worked. The detective said,

> "How they worked if they buy which is referred to as a sucker list. There is a little industry that does nothing but compile names and addresses of individuals. We have found that there are various

types of lists that have been made. Some are for people who buy contraceptives. Some are compiled by people who will buy suspect magazines through the mail or other types of things along a sexual nature, and they compile these names and they will sell them to a man who operates a club like this for maybe thirty five per thousand names.

"Now what he does is put out his little brochures. Once he is established in business and he mails them to individuals this is the way the club is perpetrated and goes on and on and enlarges.

"Now, any of the individuals receiving a solicitation from this are invited to scan the publications. They are offered to put an ad in here for a price, and they are given a code number to insure that it is very discreet and confidential. Then, if they wish to reply to any of the ads in this particular publication, they must forward a letter in a plain envelope, using the code number somewhere on the envelope. They put this envelope in another envelope and seal it up, put a stamp on it, and it has to be sent to the operator of this club.

"The operator of this club then will open the original envelope, to take out the one that is marked for whatever code number is represented on it, and then he will, in turn, forward them on.

"Now, it has been our experience that, of course, and it is quite apparent, these people do read the communications and, of course, anyone who is established here, their names are actually worth as high as a dollar a piece in the industry.

"Once the operator of this gets the transmission, let's say, from an individual who answer an ad here, he will send it on to that individual, and now these

two people are in direct contact where they actually no longer need the services of this publication. But it has been our experience that these people not only contact others; they put an ad in themselves and then start to receive mail. So it just starts to keep growing and growing and growing. It's an expanding operation. It's one of the biggest things going on in this country today." (T. 2:55 to 57).

There was testimony on the part of Inspector Dolan who was assigned in New York to investigate obscenity materials going through the mails, that his office started an investigation of the *Flair* publication as early as April 1965. His investigation disclosed that Albert J. Beard as president of Flair Enterprises, had applied on November 12, 1964, for a post office box at the Murray Hill Station, describing *Flair* as a mail forwarding service magazine club. Defendant Von Cleef had obtained Box No. 158 in her name at the Lenox Hill Station in January 1965, and 850 Lake Street in Newark had been given as a forwarding address for that box in October 1965.

Flair Enterprises also made application to First National City Bank to open a checking acccount. This application recited the concern's business as "Magazine Flair". It was signed by Beard as owner. Filed with it was a power of attorney from him designating one M. B. Moore as his attorney authorized to deposit, draw and make checks with respect to the business transacted through the bank. Defendants' attorney stipulated at the trial that Monique Van Cleef, also known as Marianna Von Cleef, was Maria B. Moore and was the same person named in the power of attorney (PA. 16-17).

Detective Magnusson explained his qualifications and background as a specialist in obscenity. Magnusson had been assigned for eight years in the Special Investigation

Division for obscenity. He had considerable training in the field of pornography, with special emphasis on sexual aberrations, including those dealing with homosexuality, transvestism, voyeurism, sadism and masochism. He had participated in almost 600 obscenity investigations (PA. 10 to 11). He then explained the significance of the various types of whips, chains, restraining equipment, straight jackets and dildos that were found (T. 2.100 to 102). The detective also described the significance of the "torture box" that was found on the premises (T. 2.111). Through Detective Magnusson, the prosecution introduced into evidence all of the equipment for torture, the books, pictures and paperbacks which are alleged to be obscene, and the financial and business records of Flair; names, correspondence and business records of Flair..

Dr. Jack Chernus, a duly qualified psychiatrist, testified that the books, pamphlets and photographs seized by the State were obscene. His testimony did not refer merely to *Spanker's Monthly* but included *Buttock Fetishism, Whip and Lash* (by "Will Beatum"), *Bound and Transformed, The Autobiography of a Flea, It's Delightful, The 120 Days of Sodom* (by the Marquis DeSade), *Lady Susan's Cruel Lover, Skirted Man, Teenage Discipline, Hermaphrodite in Silks, Dominant Female,* and *Spanker's Monthly* (PA. 19). He emphasized that these items appealed to the prurient interest of the sado-mascochists as a group (T. 2.153; T. 2.168; T. 2.174).

The defense produced Dr. Frank Caprio, also a duly qualified psychiatrist. Dr. Caprio also acknowledged that some of the printed material seized was obscene (PA. 9). Dr. Caprio examined a number of letters which were seized from the premises at 850 Lake Street. He agreed that the letters were from sado-masochists and said, "You are asking me if these letters sent by sick people who are sexual masochists if I consider them obscene and lewd. See we

are not in disagreement. I am saying they are obscene, and they come from sick people" (T. 3-134). Dr. Caprio was asked this question, "If an act of flagellation takes place on a man who is a stranger, and who is nude, to the point where he achieves orgasm, for a fee, would you consider that a lewd act? A. Yes. I have to be truthful. That would be a lewd act" (T. 3.157).

Reasons the Writ Should Not Be Granted

1. The Search Was Reasonable

This warrantless search poses no novel or *important* question which should be decided by the United States Supreme Court. The general state of law would not be affected by either an affirmance or a reversal. The New Jersey courts decided only a narrow issue, that probable cause existed for Detective Magnusson to believe that a particular statute was being violated. All the Supreme Court of the United States could ascertain if certiorari is granted is whether there was in fact probable cause for Detective Magnusson to arrest the petitioner and it is clear that there, in fact, was probable cause.

A. There Was Probable Cause for the Arrest of Petitioner.

There can be little doubt from the record that Detective Magnusson had probable cause to believe that a crime punishable by more than one year imprisonment was being committed in his presence. It is uncontested that a peace officer has the authority to arrest without a warrant when he has a reasonable basis for probable cause to believe a crime punishable by imprisonment for more than one year has been committed. *Beck* v. *Ohio*, 379 U. S. 89 (1964); *State* v. *Doyle*, 42 N. J. 334 (1964); *State* v. *Burnett*, 42 N. J. 377 (1964). As the Appellate Division found,

> "The facts known to the Officer at the time of the arrest, including Miss Von Cleef's representation as to her past experiences and intentions with regard to Magnusson's treatment in our view clearly provided probable cause for believing that the defendant Von Cleef was knowingly occupying her premises for purposes of lewdness or assignation in violation of N.J.S. 2A:133-2. Additionally, these facts reasonably justify the belief that defendant was conspiring to maintain the premises for the purpose of lewdness and to commit acts of lewdness in violation of N.J.S. 2A:98-1 and 2A:115-1." (PA. 10).

A perusal of the facts as set forth in our statement of facts indicates the propriety of the Appellate Division's conclusion. It is especially important to note the additional information was provided Detective Magnusson by the conversation which he had with Miss Von Cleef after he had arrived at the Lake Street house. It is submitted from that conversation alone he would have had probable cause to believe a crime was being committed.

B. The Scope of the Search Incident to a Valid Arrest Was Not Unreasonable.

From the record it is clear that the defendant had complete control over the premises where she was arrested (T. 1.130). It is also apparent that these premises were also premises where the crime was, in fact, being committed. The whole premises were used for the commission of the crime. *United States* v. *Rabinowitz*, 339 U. S. 56 (1950) is controlling:

> "The right to search the place where the arrest is made in order to find and seize things connected with a crime as its fruits or as a means by which it was committed seems to have stemmed from the ac-

> knowledged authority to search the person, but also the long standing practice of searching for other proofs of guilt within the control of the accused found upon arrest [citation omitted]. It became accepted that the premises where the arrest was made which premises were under the control arrested and where the crime was being committed was subject to a search without warrant." (at p. 51); see also *Maryland Penitentiary* v. *Hayden*, 387 U. S. 294 (1967); for a case in which an entire house was searched and mere evidence was introduced successfully.

It is noteworthy that the papers seized were used in the operation of petitioner's criminal enterprise.

Stanford v. *Texas*, 379 U. S. 47 (1965) is not applicable to the question at hand. That case dealt with a search warrant under a Texas State Subversive Act which permitted the police to look for evidence of communist membership and business records. In a search that was by warrant, not incidental to a valid arrest, the police took everything in sight except what was specified in the warrant. These facts are clearly not applicable to the case at bar.

Petitioner also contends that since the police had ample time to secure a warrant for Petitioner's arrest, they had time to apply for a search warrant for the residence. Of course, it is settled that, whether the police could have procured a warrant is not the test. *Cooper* v. *California*, 386 U. S. 58, 62 (1967). The question remains whether the search was reasonable.

2. The Constitution Does Not Prohibit the State from Making Criminal a Commercial Enterprise in Which Petitioners Disciplined and Punished People with a Sado-Masochistic Sexual Abberation for Profit.

The constitutionality of N.J.S. 2A:115-1 was never placed in issue by the petitioners in the Appellate Division of the Superior Court of New Jersey. The argument of the petitioners to the Appellate Division was a narrow statutory one. There, they merely argued that the conduct in question was not rendered criminal by the statutes, N.J.S. 2A:115-1 and 2A:133-2. The Appellate Division of New Jersey was never afforded an opportunity to consider the constitutionality of the statute as applied.[1]

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[1] N.J.S. 2A:115-1 states in pertinent part "Any person who . . . in private commits an act of lewdness . . . with another, *grossly scandalous and tending to debauch the morals and manners of the people,* is guilty of a misdemeanor." (Emphasis supplied.)

The petitioner argues that the Appellate Division's interpretation made criminal lewedness in the abstract a crime. However, neither the statute nor the Appellate Division has done that. The statute includes the important phrase that the lewedness must be "grossly scandalous and tend to debauch the morals and manners of the people." Private acts committed between consenting adults who may be married do not fall within the perview of this statute, as has been suggested by petitioners. For it is crystal clear from the record below that we are not here concerned with the type of situation which petitioners urge is before the Court. Petitioners have characterized the event as a simple act involving two consenting adults performed in private. Rather, the record reveals a wide system of solicitation and evidence from which it could reasonably be inferred that the lewed acts were performed on the premises for profit. The Appellate Division held that "The evidence also justifies the jury in concluding that this was not simply an isolated, erotic episode on the part of the defendant, Von Cleef, but was representative of other acts of perversion being carried on by these defendants at the premises as a part of a far-flung commercial

(*Footnote continued on following page*)

It is axiomatic that constitutional questions must have been preserved below.

Moreover, the question of lewd conduct is also covered by the violations of N.J.S. 2A:133-2 which prohibits anyone from maintaining a building for the purposes of soliciting lewdness. That statute is not under attack here. The principles enunciated by Justice Stewart in his concurring opinion in *Epton* v. *New York*, 390 U. S. 29 (1968) should be controlling here, and certiorari of this question should be denied.

(*Footnote continued from preceding page*)

enterprise (PA. 16). Moreover, this is the type of lewdness which, in fact, is grossly scandalous and tends to debauch the morals and manners of the people.

It must be noted that whatever infirmities section 115-1 might contain regarding the rights of married persons, the petitioner clearly does not have standing to assert an alleged infringement of these rights, since she is not a member of that class of persons. Furthermore, it is submitted that the petitioner has no right of sexual freedom in the privacy of her own home, and her reliance on *Griswald* v. *Connecticut*, 381 U. S. 479 (1965), is vastly misplaced. The holding of *Griswald* was narrowly drawn so as to apply only to the right of sexual privacy of *married persons*. As Justice Goldberg, in his celebrated concurring opinion, pointed out about the *Griswald* holding:

> Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity."

Since the State has a legitimate interest in prescribing the perverted sexual practices such as the petitioner engaged in, N.J.S. 2A:115-1 is not an unconstitutional infringement of the petitioner's constitutional rights.

Even if it were to be conceded that the statute is overly broad, the conduct evidenced by the record in this case is so hard-core that this court should not consider the issue. *U. S.* v. *Raines*, 362 U. S. 17, 20-23 (1960); see generally *Dombroski* v. *Pfister*, 380 U. S. 479, 486-7 (1965) for a discussion of the general rule.

3. The Books and Materials Seized Were Obscene, Especially When Viewed as Part of the Far-Flung Commercial Enterprise to Exploit People Suffering from a Sado-Masochistic Sexual Aberration.

The question before this court is not whether *Spanker's Monthly* was obscene. Numerous books, pamphlets, photographs were seized and introduced into evidence. If any of those books or pamphlets is deemed to be obscene then the petitioners are not entitled to the protection of the First Amendment to prohibit the State from imposing criminal sanctions. No questions of *scienter* or intent have been raised by petitioner. The only issue is the obscenity of this material.

It is clear that most of the material involved is patently obscene under the standard of *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts,* 383 U. S. 413 (1966). In fact, the *Autobiography of a Flea* is used as an example of hardcore pornography by the Doctors Kronhausen, Kronhause and Kronhausen, *Pornography and the Law* (Rev. Ed. 1964).

Even if the material is not obscene in the abstract, it is most certainly obscene when considered as part of a commercial system of exploitation of individuals with a sado-masochistic sexual aberration. Justice Brennan, in *Ginzburg* v. *United States,* 383 U. S. 453 (1966), viewed these publications "against a background of commercial exploitation of erotic solely for the sake of their prurient appeal." There he found that the record indicated that the material was sold as part of the "sordid business of pandering". It must be remembered that both the magazine "Eros" and the "Handbook on Selective Promiscuity" almost certainly would not have been held to be obscene had they been judged in the abstract. Ginzburg's experts testified to the therapeutic value of the "Handbook". The trial court in *Ginzburg* singled out only four articles in "Eros" as objec-

tionable. Nevertheless, it is clear that each of the four articles had some redeeming social value. A photo essay which dealt with interracial love was termed "outstandingly beautiful" by Professor Horst W. Janson, Chairman of the Fine Arts Department of the New York University. Dwight McDonald, an eminent critic, also praised the essay. McDonald additionally found an article by Doctors Eberhard and Phyllis Kronhausen as "an extremely interesting and important study." Another article found to be objectionable by the trial judge in the *Ginzburg* case was an excerpt from "My Life and Love" by Frank Harris, a book that Justice Douglas pointed out has been extensively reviewed in serious periodicals and has indisputably attained some statute. *Ginzburg* v. *United States, supra,* at page 488.

It seems clear from the record in *Ginzburg* that under the standard applied in *Roth* v. *United States,* 354 U. S. 476 (1957) and *Jacobellis* v. *Ohio,* 383 U. S. 184 (1963) and the *Fanny Hill* case, *supra, Ginzburg* was not even "a close case." The facts in *Ginzburg* lead to the conclusion that evidence of pandering and commercial exploitation is of the utmost importance. In this case, a review of the records, indicates the existence of a system of commercial exploitation that far exceeds that in the *Ginzburg* case. Business records of *Flair,* the large list of names, the correspondence, and Detective Magnusson's explanation of the workings of this sordid business all color in the details of a gigantic commercial business. The *Ginzburg* case appears to have adopted Chief Justice Warren's concurring opinion in *Roth.*[2] In that opinion the Chief Justice wrote:

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[2] It has been suggested that the *Ginzburg* case, far from adding another link to the chain of the Supreme Court's definitions of obscenity, represents a radical departure from the carefully concepted Roth-Jacobellis test. Sibler, "The Supreme Court and Obscenity: the Ginzberg Test—Restrictions of First Amendment Freedoms Through Loss of Predictability," 21 Rutgers Law Review 56 (1966).

"Present laws depend largely upon the effect that the materials may have upon those who receive them. . . . It is not the book that is on trial, it is the person. The conduct of the defendant is the central issue, not the obscenity of the book or the picture." *Roth* v. *United States, supra,* at page 495. Clearly, the conduct of the petitioners in this case is not protected by the First Amendment to the Constitution of the United States.

4. The Due Process Clause of the Fourteenth Amendment Does Not Require That Evidence of Other Publications Held Not Obscene by This Court be Admitted into Evidence.

There is no constitutional requirement that a trial judge admit into evidence publications adjudged not obscene for the purpose of comparison to those in issue. *Books, Inc.* v. *United States,* 358 F. 2d 935, 939 (1st Cir. 1966), reversed *per curiam* on other grounds 388 U. S. 449 (1967). There Judge Wyzanski held that the trial judge did not abuse his discretion in so ruling. In the case *sub judice,* the trial judge relied on that case and on Rule 4 of the New Jersey Rules of Evidence which permits the judge to prohibit the admission of probative evidence if he feels that it will result in the trial of a tangential issue and unduly consume time. This is precisely what the trial judge did here. The wisdom of his ruling becomes all the more apparent when the rationale of the *Ginzburg* case is recalled. If it is not the book that is on trial but rather the person, then the rulings concerning other books that are available and have been held to be not obscene lessen in probative value. Moreover, while the material in question may have been similar to *Spanker's Monthly,* it is not similar to the other material which was before the jury, another factor which diminishes the probative value. The ruling is evidentiary, and, it is submitted, a proper one. But even if the ruling were to be improper, such an error is hardly of Constitutional dimension.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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